

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On March 6, 2018 appellant, then a 62-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on March 2, 2018 she sustained left shoulder, hip, and knee injuries when she fell over a box while in the performance of duty. She stopped work on the alleged date of injury.

Appellant submitted a March 2, 2018 hospital emergency department report signed by Paula F. Paul, a physician assistant.

In a development letter dated March 21, 2018, OWCP informed appellant that the evidence of record was insufficient to establish her claim. It advised her of the type of factual and medical evidence needed and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence.

In response, appellant submitted March 14, 2018 reports by Dr. Eric T. Johnson, a Board-certified orthopedic surgeon. Dr. Johnson described the March 2, 2018 employment incident in which appellant fell over a box while at work, landing on her left side. He noted that she developed moderate-to-severe left shoulder symptoms. Dr. Johnson diagnosed a left hip contusion.

In reports dated March 28, 2008, Dr. Johnson noted pain in the left iliotibial band to the knee, a moderately antalgic gait, positive Hawkins and Neer's tests of the left shoulder, and pain with extremes of left shoulder motion. He diagnosed left shoulder impingement, a left hip contusion, and acute left knee pain. Dr. Johnson ordered a magnetic resonance imaging (MRI) scan of the left shoulder.

By decision dated April 25, 2018, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish that the March 2, 2018 employment incident occurred as alleged.

On May 24, 2018 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

OWCP received a March 6, 2018 witness statement by P.B., appellant's coworker, who recalled that on March 2, 2018 she saw appellant lying on the floor. P.B. approached appellant, who stated that appellant had tripped over a cardboard box. She then called for an ambulance.

In May 2, 2018 reports, Dr. Johnson reviewed an April 4, 2018 MRI scan of the left shoulder, which demonstrated partial-thickness rotator cuff pathology and significant

acromioclavicular joint changes.³ He opined that these findings were consistent with the mechanism of the March 2, 2018 employment injury. Dr. Johnson diagnosed tendinopathy of the left shoulder, a complete left rotator cuff tear, left shoulder impingement syndrome, left acromioclavicular arthritis, and left iliotibial band syndrome. He returned appellant to permanent modified duty.

In a June 15, 2018 report, Dr. Leo W. Rasis, a Board-certified orthopedic surgeon, opined that appellant had sustained left shoulder, left knee, and left hip injuries when she fell over a box at work on March 2, 2018. He noted a history of a November 2017 left knee injury with degenerative changes demonstrated on imaging studies.

In a July 9, 2018 report, Dr. Johnson noted continued left shoulder pain and restricted range of motion. He diagnosed complete tear of the left rotator cuff, left acromioclavicular arthritis, left shoulder impingement syndrome, and tendinopathy of the left shoulder. Dr. Johnson administered a subacromial injection to the left shoulder.

During the hearing held on September 25, 2018 appellant contended that the factual evidence of record established that the March 2, 2018 employment incident had occurred as alleged. Following the hearing, she submitted an August 22, 2018 report by Dr. Johnson reiterating his prior diagnoses of the left shoulder. Dr. Johnson prescribed additional physical therapy and medication.

By decision dated November 7, 2018, OWCP's hearing representative modified the prior decision to accept that the March 2, 2018 employment incident occurred as alleged and that appellant sustained a left hip contusion as a result of the accepted employment incident. The hearing representative, however, affirmed the denial of the claim with regard to the additional claimed left shoulder, left hip, and left knee conditions.

By decision dated November 8, 2018, OWCP formally accepted appellant's traumatic injury claim for left hip contusion.

On July 25, 2019 appellant, through counsel, requested reconsideration of the November 7, 2018 decision. Counsel contended that an enclosed July 24, 2019 report by Dr. Johnson was sufficient evidence to warrant expansion of the claim to include a left shoulder condition. He asserted that Dr. Johnson provided a good description of the mechanism of the left shoulder injury sufficient to establish causal relationship. In a July 24, 2019 report, Dr. Johnson described the accepted March 2, 2018 employment incident and summarized appellant's treatment history. He noted that appellant reported left shoulder, hip, and knee pain. In a March 28, 2018 examination, Dr. Johnson observed clicking in the left shoulder, tightness with range of left shoulder motion, and difficulty performing activities of daily living. Appellant required prescription narcotic analgesic medication. Dr. Johnson opined that she sustained a left shoulder injury associated with the accepted March 2, 2018 employment incident. He explained that, although appellant had some preexisting degenerative changes in the left shoulder, the March 2, 2018 fall resulted in rotator

³ An April 4, 2018 MRI scan of the left shoulder demonstrated a partial-thickness tear to the middle fibers of the supraspinatus tendon, tendinopathy of the remaining supraspinatus tendon, arthritic changes of the acromioclavicular joint with osteophytic hypertrophy, and subacromial/subdeltoid bursitis.

cuff pathology, symptoms of left shoulder impingement syndrome, and bursal changes resulting in adhesive capsulitis. Dr. Johnson advised that preexisting acromioclavicular arthritis with osteophytic hypertrophy “may have had a dramatic worsening associated with the fall and blow to the lateral aspect of her shoulder.” Appellant also had subacromial and subdeltoid fluid present on examination, indicative of left shoulder bursitis, and a partial thickness supraspinatus tendon tear. Dr. Johnson opined that it was “within a reasonable degree of medical probability that the fall directly resulted in the shoulder contusion, shoulder impingement syndrome, partial-thickness rotator cuff pathology, and bursitis changes resulting in adhesive capsulitis of the left shoulder.”

OWCP also received July 15 and September 4, 2019 reports by Dr. Rasis, who opined that the March 2, 2018 employment incident caused injuries to the left shoulder, knee, and hip. Dr. Rasis administered a left knee injection.

In an August 21, 2019 report, Dr. Johnson noted continued left shoulder pain. He administered a subacromial injection to the left shoulder.

By decision dated October 1, 2019, OWCP denied modification of the November 7, 2018 decision.

On September 28, 2020 appellant, through counsel, requested reconsideration of the October 1, 2019 decision. Counsel contended that Dr. Johnson’s July 24, 2019 report presented a “*prima facie* case” in support of causal relationship. He noted that Dr. Johnson opined that the accepted March 2, 2018 employment incident caused rotator cuff pathology, impingement syndrome, pain, and bursal changes. Counsel resubmitted a copy of Dr. Johnson’s July 24, 2019 report previously of record.

By decision dated December 3, 2020, OWCP denied appellant’s request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.⁴

To require OWCP to reopen a case for merit review, pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁵

⁴ 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

⁵ 20 C.F.R. § 10.606(b)(3); *see L.D., id.*; *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁶ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁷ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁸

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

Appellant has not shown that OWCP erroneously applied or interpreted a specific point of law; nor has appellant advanced a relevant legal argument not previously considered by OWCP. In support of her request for reconsideration, appellant, through counsel, submitted a September 28, 2020 letter asserting that specific clinical findings and opinions in Dr. Johnson's July 24, 2019 report had established a *prima facie* case in support of a causal relationship between the accepted March 2, 2018 employment incident and the diagnosed left shoulder conditions. This argument is substantially similar to counsel's July 25, 2019 argument in which he also contended that Dr. Johnson's July 24, 2019 report was sufficient to warrant expansion of the acceptance of appellant's claim to include a traumatic left shoulder injury. Thus, appellant has not provided a relevant legal argument not previously considered by OWCP. Therefore, she is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).⁹

The underlying issue in the case is whether appellant has provided sufficient medical evidence to establish that she sustained a left shoulder condition as a result of the accepted March 2, 2018 employment injury.

In support of appellant's request for reconsideration, counsel provided his September 28, 2020 letter, and a copy of Dr. Johnson's July 24, 2019 report previously of record. While counsel's statement is new, it is not relevant as it is substantially similar to his July 25, 2019 letter previously of record. Similarly, Dr. Johnson's report is a duplicate copy of the July 24, 2019 report previously of record. Providing additional evidence that either duplicates or is substantially similar to

⁶ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of the merit decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees Compensation System (iFECS). Chapter 2.1602.4b.

⁷ *Id.* at § 10.608(a); *see also* *M.S.*, 59 ECAB 231 (2007).

⁸ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁹ *P.S.*, Docket No. 20-1090 (issued September 9, 2021); *A.G.*, Docket No. 20-0290 (issued June 24, 2020); *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

evidence already in the case record does not constitute a basis for reopening a case.¹⁰ As appellant did not provide relevant and pertinent new evidence, she is also not entitled to a merit review based on the third requirement under section 10.606(b)(3).¹¹

The Board, accordingly, finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹²

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the December 3, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 29, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

¹⁰ *P.S., id.*; see *G.J.*, Docket No. 20-0071 (issued July 1, 2020); *V.Q.*, Docket No. 19-1309 (issued January 3, 2020); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

¹¹ *Supra* note 5 at § 10.606(b)(3)(iii); *T.W.*, Docket No. 18-0821 (issued January 13, 2020).

¹² *D.G.*, Docket No. 19-1348 (issued December 2, 2019).